

Prior to sentencing, neither Petitioner nor his attorney requested that Petitioner be placed in the "Fast Track" program for aliens convicted of unlawful reentry after deportation, a program which did not exist in this District at that time. (Gov't Opp. [Dkt. 42] at 2.) Also prior to sentencing, on January 5, 2012, Petitioner met with federal investigators at his request to share information about another defendant. (*Id.* at 11.) The individual about whom Petitioner shared information already had pled guilty on November 18, 2011. (*Id.*)

On November 1, 2012, Petitioner filed a Motion to Vacate, Set Aside, or Correct Sentence, pursuant to 28 U.S.C. § 2255. [Dkt. 36.] After receiving an extension from this Court, the Government filed its opposition on December 13, 2012. [Dkt. 42.] Petitioner replied on March 8, 2013. [Dkt. 48.]

Petitioner's Motion is now before the Court.

II. Standard of Review

Under 28 U.S.C. § 2255, a prisoner in federal custody may attack his sentence on four grounds: (1) the sentence was imposed in violation of the Constitution or the laws of the United States; (2) the court was without jurisdiction to impose the sentence; (3) the sentence was in excess of the maximum authorized by law; or (4) the sentence is otherwise subject to collateral attack. *See Hill v. United States*, 368 U.S. 424,

426-27 (1962). To prevail on a § 2255 Motion, the petitioner bears the burden of proof by a preponderance of the evidence. *Miller v. United States*, 261 F.2d 546, 547 (4th Cir. 1958).

III. Analysis

Petitioner argues that his sentence is subject to collateral attack for two reasons: (1) he asserts that the Government should have allowed him to participate in the "Fast Track" program; and (2) he challenges the Government's decision not to file a Rule 35(b) motion on his behalf. The Court rejects both of Petitioner's arguments.

First, Petitioner fails to state a claim providing a basis for collateral relief regarding the "Fast Track" program. Fast track programs allow defendants charged with felony illegal reentry to earn a reduced sentence in exchange for a quick guilty plea. *See Jimenez v. United States*, No. 12-CV-2697-BMC, 2012 WL 1965411, at *1 (E.D.N.Y. May 31, 2012). After such programs were developed and implemented in a variety of jurisdictions starting in the 1990s, on January 31, 2012 the U.S. Department of Justice issued a memorandum authorizing fast track programs in every district, beginning March 1, 2012, for cases charging illegal reentry after deportation in violation of 8 U.S.C. § 1326. *See* Memorandum of Deputy Attorney General James M. Cole, Department Policy on Early Disposition or "Fast-Track" Programs, January 31, 2012, at 1-2, available at <http://>

www.justice.gov/dag/fasttrack-program.pdf ("DOJ Fast Track Memo"). Accordingly, on March 1, 2012, this District implemented such a program. See U.S. Attorney's Office for the Eastern District of Virginia, Immigration Reentry Case Intake and Fast Track Program Standards: 8 U.S.C. § 1326 (March 12, 2012). However, consistent with the Department of Justice's position in this new memorandum, courts across the country have found that the existence of a fast track program does not create any enforceable right under the Constitution or any federal law, and a defendant's participation in such a program is a matter for the United States Attorney's discretion. See *Ozuna-Cabrera v. United States*, No. 08-CR-10082-RGS, 2012 WL 5398566, at *3 (D. Mass. Nov. 1, 2012) ("The recommendation of a Fast Track departure remained solely a matter for the local U.S. Attorney's discretion."); *United States v. Orjuela-Medina*, No. 8:05-Cr-381-T-24MAP, 2012 WL 4854710, at *2 (M.D. Fla. Oct. 11, 2012); *United States v. Ojeda-Texta*, No. 10-CR-156, 2012 WL 4210292, at *1 (E.D. La. Sept. 19, 2012) ("the program exclusively vests discretion to implement the fast-track program in a particular case with the United States Attorneys"); *De Paz-Salvador v. United States*, No. 3:09-CR-018-CAR, 2012 WL 4854651, at *2 (M.D. Ga. Sept. 14, 2012) (noting that the program does not create any substantive rights and "gives broad discretion to prosecutors to determine whether a fast-track program will be offered to a

defendant"); *United States v. Seledon-Lopez*, No. 2:09-CR-0246-RLH-RJJ, 2012 WL 1744535, at *1 (D. Nev. May 15, 2012) (noting that the fast-track policy "did not create any substantive or procedural rights for Defendant"); see also DOJ Fast Track Memo at 1. As a result, Petitioner has no basis for collateral relief under § 2255 regarding his lack of participation in this District's fast track program.

Second, Petitioner fails to state a claim regarding the Government's refusal to file a Rule 35(b) motion sufficient to trigger this Court's review of that decision. A district court has no authority to review the government's refusal to file a Rule 35(b) motion unless that decision was based on an unconstitutional motive, such as the defendant's race or religion. See *Wade v. United States*, 504 U.S. 181, 185-86 (1992); *United States v. Butler*, 272 F.3d 683, 686 (4th Cir. 2001); *United States v. Anderson*, 2012 WL 6021322, at *7 (E.D. Va. Dec. 3, 2012). To trigger such review, a defendant must make a "substantial threshold showing" of improper motives by the Government. *United States v. Saquella*, 2012 WL 405060, at *3 (E.D. Va. Feb. 7, 2012) (internal citations omitted). Accordingly, a defendant "who merely claims to have provided substantial assistance or who makes only generalized allegations of an improper motive is not entitled to a remedy or to even an

evidentiary hearing." *United States v. Dorsey*, 554 F.3d 958, 961 (11th Cir. 2009) (citing *Wade*, 504 U.S. at 186).

Petitioner claims that the Government promised him that it would file a Rule 35(b) motion on his behalf and also claims that the Government failed to do so because of an improper motive. (Pet. Mot. at 5, 14-17.) To begin, Petitioner provides no evidence of such a promise and his plea agreement makes clear that the Government "reserve[d] the right" to seek a reduction "in its sole discretion." (Plea Agreement [Dkt. 18] ¶ 12.) Petitioner also fails to make a substantial threshold showing of improper motives behind the Government's decision. The sole unconstitutional motive which Petitioner identifies is that the Government allegedly refused to file a Rule 35(b) motion because he is a homosexual. (Pet. Mot. at 6, 14, 16-17.) Petitioner, however, provides no evidence in support of his accusation. Moreover, as already noted in the PSR, investigations prior to sentencing indicated that Petitioner falsely portrayed himself as a cross-dresser and a homosexual in order to persuade an immigration judge not to remove him from the United States. (PSR [Dkt. 26] ¶ 102 n.1.) Given Petitioner's failure to meet the threshold showing of improper motive, the Court may not review the Government's decision regarding a Rule 35(b) motion.

IV. Conclusion

For the foregoing reasons, the Court will deny
Petitioner's Motion.

An appropriate Order will issue.

June 6, 2013
Alexandria, Virginia

/s/
James C. Cacheris
UNITED STATES DISTRICT COURT JUDGE